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23 **UNITED STATES DISTRICT COURT**  
24 **DISTRICT OF NEVADA**

25 ADDISON HEMPEL, CASSIDY  
26 HEMPEL, CHRISTINE HEMPEL, HUGH  
27 HEMPEL, and SOLUTION  
28 THERAPEUTICS,

Plaintiffs,

v.

CYDAN DEVELOPMENT, INC.,  
CYDAN II, INC., VTESSE, INC.,  
SUCAMPO PHARMACEUTICALS,  
INC., and DOES I-X and ROE  
CORPORATIONS I-V, inclusive,

Defendants.

Case No. 3:18-cv-00008-MMD-VPC

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
DEFENDANTS' CONSOLIDATED  
MOTION TO DISMISS FOR FAILURE  
TO STATE A CLAIM AND LACK OF  
FEDERAL SUBJECT MATTER  
JURISDICTION**

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1 Plaintiffs Addison, Cassidy, Christine, and Hugh Hempel and Solution Therapeutics  
2 (“Plaintiffs” or the “Hempels”) submit this Memorandum of Points and Authorities in Opposition  
3 to the Consolidated Motion to Dismiss for Failure to State a Claim and Lack of Subject Matter  
4 Jurisdiction by Defendants Cydan Development, Inc. (“Cydan”)<sup>1</sup>, Cydan II, Inc., Vtesse, Inc., and  
5 Sucampo Pharmaceuticals, Inc, ECF No. 12 (“DM”).

### 6 PRELIMINARY STATEMENT

7 Defendants’ motion should be denied. The Hempels pioneered the development of cy-  
8 clodextrin to treat Niemann Pick Disease, Type C (“NPC”)—an ultra-rare, degenerative, and fatal  
9 disease that afflicts the Hempel Twins. The Hempels took extraordinary personal risks, invested  
10 millions of dollars and years of effort developing cyclodextrin, and successfully obtained unprec-  
11 edented FDA approvals in 2009 and 2010. In 2013, as word of the Hempels’ success spread,  
12 Cydan—a venture capital firm—became interested in their work. Cydan deliberately fostered and  
13 abused a relationship of trust with the Hempels: it gained access to their confidential information  
14 and trade secrets (the “Protected Material”), broke its promises of confidentiality and non-use,  
15 usurped the Hempels’ commercial opportunity, formed Vtesse in the image of the Hempels’ pro-  
16 posal, and sold Vtesse’s cyclodextrin asset (VTS-270) for \$200 million. On these facts, the Com-  
17 plaint states claims for, *inter alia*, breach of contract, misappropriation of trade secrets, and breach  
18 of fiduciary duty.

19 Defendants move to dismiss the Complaint with a raft of objections that overlook the alle-  
20 gations and misapprehend controlling law:

21 *First*, the Hempels have enforceable contracts with Defendants. A corporate promoter has  
22 the power to enforce pre-incorporation contracts, even if the proposed corporation never comes  
23 into being. The Hempels entered into express and implied contracts with Cydan on behalf of So-  
24 lution Therapeutics, a wholly-owned company they never incorporated. And the Hempels con-  
25 ferred the benefits of those contracts on Cydan and Vtesse. Accordingly, the Hempels have the

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26  
27 <sup>1</sup> Unless otherwise stated, capitalized terms have the same definition as in the Complaint.

power to enforce those contracts and hold Defendants liable for their breach.

*Second*, the Hempels have alleged breaches of contract, misappropriation, and breaches of fiduciary duty. To gain access to the Hempels' Protected Material, Defendants promised not to use the information for any purpose, except to consider a business relationship with the Hempels. Instead, Defendants reviewed everything the Hempels had developed, collaborated with the Hempels over six months to build a joint enterprise, and assured the Hempels that they were going forward with the project. And then, in secret, Cydan used the Hempels' Protected Material to form Vtesse and cut the Hempels out of the venture.

*Third*, Vtesse, Sucampo, and Cydan II are also liable for misappropriation and unjust enrichment. Because Cydan's misappropriators sat on Vtesse's board of directors, Vtesse is imputed with their knowledge and, thus, knowingly accepted the benefits of their misappropriation. Moreover, Vtesse and Sucampo received and used the Hempels' Protected Material, which they knew or should have known was misappropriated. The Hempels' Protected Material were wholly-unique, and related to an ultra-rare disease in a small medical research and development community. Anyone who came to possess that data, particularly after doing diligence on a treatment the Hempels had designed, would have known its source. Finally, Cydan II and Sucampo are liable as successors-in-interest.

For these reasons, and those stated herein, Defendants' motion should be denied in its entirety. If the Court grants any part of the motion, the Hempels request leave to amend the Complaint to conform to their opposition filings, and cure any deficiencies identified by the Court.

## BACKGROUND

**A. The Hempels Are the First in the World to Develop a Cyclodextrin Protocol to Treat NPC in Human Beings**

Addison and Cassidy Hempel are twins, born on January 23, 2004. *See* Compl., ECF Doc. No. 1, ¶ 2. In 2007, the twins were diagnosed with NPC, an ultra-rare, degenerative neurological disease. *Id.* There are approximately 100 known cases in the United States. NPC causes severe disability, with symptoms akin to Alzheimer's disease, and premature death. *Id.*

1 In 2007, there was no approved treatment for NPC in the United States. Compl. ¶ 24. That  
2 year, a research paper was published showing that cyclodextrin could be used to treat NPC-like  
3 symptoms in mice. *Id.* ¶ 30. Upon learning of the publication, the Hempels both left their employ-  
4 ment, and invested approximately \$3 million of their personal time and money, along with millions  
5 of dollars in donations they raised and *pro bono* work they elicited from world-class physicians,  
6 to develop their own, privately-funded treatment for NPC using cyclodextrin. *Id.* ¶ 3. In 2009 and  
7 2010, the United States Food and Drug Administration (“FDA”) approved the Hempels’ proposals  
8 for the clinical use of cyclodextrin in treating their daughters. It was the first time the FDA had  
9 approved the use of cyclodextrin in humans. *Id.* ¶ 4.

10 Initially, the Hempels explored three different drug delivery pathways for treating NPC  
11 with cyclodextrin: intravenous injections (*i.e.*, bloodstream), intrathecal injections (*i.e.*, lower spi-  
12 nal cord), and intracerebral injections (*i.e.* directly into the brain). Compl. ¶¶ 38-40. Ultimately,  
13 the Hempels and their team of doctors, scientists, and advisors focused on intravenous and in-  
14 trathecal cyclodextrin therapy, developing the first protocols for treating humans accordingly. *Id.*  
15 ¶ 40. Between 2009 and 2013, the Hempels compiled a library of medical research and data evi-  
16 dencing that bi-monthly intrathecal injections of cyclodextrin was the most effective method  
17 known. *Id.* ¶ 42. The Hempels maintained the data in confidence, disclosing it only to the FDA  
18 and to physicians and researchers who received the information under express and implied agree-  
19 ments that the data would not be used for commercial purpose. *Id.* ¶¶ 80-81.

20 In 2011, the Hempels began developing a confidential business plan for an entity they re-  
21 ferred to as Solution Therapeutics. Compl. ¶ 42; *see also* Decl. of Hugh Hempel (“Hempel Decl.”)  
22 Ex. 3 (“Business Plan”). The 43-page Business Plan detailed how the Hempels intended to com-  
23 mercialize the cyclodextrin treatments they had developed, using the extensive and unique data set  
24 they had compiled to validate the viability of the investment. Compl. ¶ 42. The Hempels planned  
25 to obtain FDA marketing approval for cyclodextrin, which would grant them exclusive commer-  
26 cialization rights. *Id.* ¶ 45. Moreover, because NPC is an ultra-rare pediatric disease, successful  
27 development of a therapeutic drug was expected to result in a “Priority Review Voucher” from the  
28

1 FDA, worth hundreds of millions of dollars. *Id.* ¶ 47. The Business Plan said the Hempels would  
2 split the proceeds of any commercialization 50/50 with their investors. *Id.* They intended to dedi-  
3 cate their share to fund a non-profit dedicated to benefiting NPC research and reducing patient  
4 costs. *Id.*; *see also* Business Plan at 4 (50/50 venture).

5 **B. Cydan Misappropriates the Hempels' Protected Material for Vtesse**

6 The Hempels and their efforts were well-known in the NPC community and their successes  
7 were widely reported. Compl. ¶¶ 4, 27. In late June 2013, Chris Adams, the then-Chief Business  
8 Officer of Cydan—a venture capital-backed drug development incubator—contacted Hugh  
9 Hempel to discuss an investment in the Hempels' efforts. *Id.* ¶ 43. After months of conversations,  
10 Adams invited Hugh to meet in person with Cydan to discuss a collaboration. *Id.* ¶ 45. In advance  
11 of the meeting, Hugh emailed Cydan a copy of the Business Plan, which was marked “Confiden-  
12 tial.” *Id.* ¶ 45. Christina Csimma, the then-CEO of Cydan, responded that “[t]he work you have  
13 done is truly amazing.” *Id.* ¶ 48.

14 Hugh met with Cydan on September 13, 2013, for two hours to discuss their joint venture.  
15 *See* Compl. ¶ 49; Hempel Decl. ¶ 7. The next day, Deb Geraghty of Cydan requested a confiden-  
16 tiality agreement and access to the Hempels' medical data and research. Compl. ¶ 50. In response,  
17 Hugh sent a proposed “Agreement for Mutual Exchange of Confidential Information” between  
18 Solution Therapeutics, and Cydan. *Id.* ¶ 51; *see also* Hempel Decl. Ex. 5 (the “Confidentiality  
19 Agreement”). The Confidentiality Agreement prohibited Cydan from disclosing the Hempels'  
20 confidential information to any third-party or using it for any purpose other than consideration of  
21 a possible joint venture between the parties. Compl. ¶¶ 52-54; *see also* Confidentiality Agreement,  
22 Recitals. Csimma countersigned on behalf of Cydan. Compl. ¶¶ 48 & 56; *see also* Confidentiality  
23 Agreement 3.

24 Pursuant to the Confidentiality Agreement, and at Cydan's request, the Hempels disclosed  
25 to Cydan virtually everything they had developed over the previous five years regarding cyclodex-  
26 trin and NPC. Compl. ¶ 57. They gave Cydan access to their password-protected library of confi-  
27 dential medical research, treatment results and their daughters' patient data, and their confidential  
28

1 FDA submissions. *Id.* ¶¶ 59-64. And, at Cydan's request, they used their goodwill to facilitate  
2 introductions between Cydan and NPC and NIH researchers. *Id.* ¶ 59.

3 For months thereafter, Hugh discussed and developed the intended joint venture with  
4 Cydan. *Id.* ¶ 64. On January 16, 2014, Geraghty emailed the Hempels to say Cydan was moving  
5 forward with the NPC project. *Id.* ¶ 65; Hempel Decl. ¶ 11 & Ex. 7. One month later, Adams and  
6 Hugh had a call to discuss the next steps. Compl. ¶ 66.

7 Then, without explanation, Cydan broke off communications. Compl. ¶ 67. The Hempels  
8 assumed Cydan had decided to abandon the project. *Id.* But they were wrong. Rather, Cydan went  
9 forward with the project on its own and in secret. Without the Hempels' knowledge, in May 2014,  
10 Cydan formed Vtesse, a company dedicated to commercializing an intrathecal cyclodextrin treat-  
11 ment for NPC patients, known as VTS-270, with the goal of gaining marketing exclusivity and a  
12 Priority Review Voucher, the identical treatment and business strategy proposed by the Hempels.  
13 *Id.* ¶ 69. In other words, Cydan formed Vtesse in the image of Solution Therapeutics; Vtesse was  
14 what Solution Therapeutics was supposed to be. Compl. ¶ 71.

15 Prior to Vtesse's launch, only the Hempels had collected substantial data regarding in-  
16 trathecal cyclodextrin injections, and their Protected Material was the best evidence of the treat-  
17 ment's efficacy and commercial viability. *Id.* That Protected Material was the foundation of the  
18 Vtesse enterprise. Vtesse's scientific review board consisted of the same NPC and NIH researchers  
19 identified in the Hempel's Business Plan, and to whom the Hempels had introduced Cydan. *Id.* ¶¶  
20 15 & 91. Csimma and Adams sat on Vtesse's board of directors. *Id.* ¶ 71.

### 21 **C. NIH-Funded Researchers Misappropriate the Hempels' Data for Vtesse**

22 After its formation, Vtesse continued to misappropriate and use the Hempels' trade secrets,  
23 including from NIH-funded researchers. In the years prior to Vtesse's formation, the Hempels had  
24 selectively disclosed their Protected Material to specific researchers who wanted to treat specific  
25 NPC patients. The Hempels disclosed that information with the express and implied understanding  
26 that their Protected Material would only be used for *medical, not commercial*, purposes. *Id.* ¶ 91.  
27 But Vtesse sought out those researchers, and offered to fund their research, so Vtesse could use  
28

1 their results for commercial gain. *Id.* ¶¶ 75-91.

2 For example, in September 2013, the Hempels granted Dr. Elizabeth Berry-Kravis a right  
3 of reference (“ROR”)<sup>2</sup> to their confidential medical data in support of her application to the FDA,  
4 so that she could treat two patients intrathecally with cyclodextrin. *Id.* ¶ 78. After gaining author-  
5 ization from the Hempels to reference their data for medical purposes, Berry-Kravis modified her  
6 study at Vtesse’s request, so that Vtesse could use her results to support its competitive commercial  
7 efforts. *Id.* ¶¶ 78-80. Vtesse rewarded Berry-Kravis’s misappropriation by placing her on its sci-  
8 entific board of review. *Id.* ¶ 91.

9 Vtesse also misappropriated the Hempels’ data through the NIH-affiliated researchers it  
10 captured. In December 2012, NIH researchers began a phase 1 trial of intracranial injections of  
11 cyclodextrin in NPC patients. *See* Compl. ¶ 83. The Hempels gave the NIH an ROR to their data  
12 for the trial because the NIH assured them in writing that its study would not compete with the  
13 Hempels’ intrathecal and intravenous cyclodextrin research and development efforts. *Id.* After  
14 three participants in the NIH’s trial suffered brain infections, the FDA shut it down in the spring  
15 of 2013. *Id.* ¶ 84.

16 When the NIH failed, it sought to reconfigure its cyclodextrin studies. Compl. ¶ 85. In June  
17 2013, the NIH-funded researchers discussed how to pivot from intracranial to intrathecal treat-  
18 ment. *Id.* They acknowledged that the only way to avoid spending years developing a data set  
19 sufficient to convince the FDA that intrathecal cyclodextrin treatments were safe would be to ref-  
20 erence the Hempels’ data. *Id.* ¶ 86. Rather than ask the Hempels for permission, however, they  
21 said they would secure access through “backchannels” at the FDA. *Id.* ¶ 88.

22 Upon information and belief, that is precisely what the NIH researchers did. *Id.* Just three  
23 months after saying their options were either (a) spend years compiling safety data, or (b) misap-  
24 propriate the Hempels’ trade secrets, NIH-funded researchers began intrathecal cyclodextrin study  
25 using dosages supported by the Hempels’ data. Compl. ¶¶ 85-88. Thereafter, Vtesse took over the

26  
27 <sup>2</sup> A right of reference is an instruction to the FDA to consider one party’s proprietary data when  
28 considering another party’s proposed protocol. *See, e.g.*, 21 C.F.R. § 312.23(b).

1 NIH's intrathecal cyclodextrin trial. *See id.* ¶¶ 76-77. And Vtesse placed the NIH-funded research-  
 2 ers who were conducting the trial, *i.e.*, the NIH-funded researchers who had misappropriated the  
 3 Hempels' Protected Material, on its scientific review board. *Id.* ¶¶ 81-91.

#### 4 **D. Sucampo Acquires Vtesse for \$200 Million and Subsumes Its Operations**

5 In January 2016, Vtesse announced it had secured key approvals for its intrathecal cy-  
 6 clodextrin treatment for NPC, *i.e.*, Breakthrough Therapy and Rare Pediatric Disease designations.  
 7 Compl. ¶ 92. In April 2017, Sucampo announced it had purchased Vtesse for \$170 million in cash  
 8 and 2.8 million Sucampo shares. *Id.* ¶ 93. Sucampo's valuation of Vtesse was based upon the  
 9 expected FDA grant of commercial exclusivity to VTS-270 (a cyclodextrin molecule equivalent  
 10 to the molecule used by the Hempels in their studies) to treat NPC, and the expected Priority Re-  
 11 view Voucher that would follow. *Id.* ¶ 112. In December 2017, Mallinckrodt announced that it  
 12 was acquiring Sucampo and VTS-270. *See* Decl. of Joshua L. Seifert, dated Apr. 23, 2018 ("Seifert  
 13 Decl."), Ex. 5. Vtesse was barely mentioned—only as the prior owner of VTS-270—because it  
 14 had been fully enveloped into Sucampo's enterprise. *Id.*

### 15 **ARGUMENT**

16 "Federal pleading rules call for 'a short and plain statement of the claim showing that the  
 17 pleader is entitled to relief.'" Fed. Rule Civ. Proc. 8(a)(2). A plaintiff need only allege "sufficient  
 18 factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v.*  
 19 *Iqbal*, 556 U.S. 662, 678 (2009). The court takes all material allegations as true, and construe[s]  
 20 them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898  
 21 (9th Cir. 1986). "A claim has facial plausibility when the plaintiff pleads factual content that allows  
 22 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."  
 23 *Iqbal*, 556 U.S. at 678. The law "do[es] not countenance dismissal of a complaint for imperfect  
 24 statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby*, 135 S. Ct.  
 25 346, 346 (2014).



**I. THE HEMPELS HAVE STATED A CLAIM FOR BREACH OF CONTRACT**

Defendants' motion to dismiss the Hempels' contract claim misapprehends corporate promoter law, ignores the implied contract between Cydan and the Hempels, and overlooks the allegations that Cydan executives both used the Hempels' Protected Material and improperly disclosed it to Vtesse, which knowingly accepted the benefit of those contracts and breaches.

**A. The Hempels Have Alleged Enforceable Contracts with Cydan**

The Complaint alleges at least two agreements between the Hempels and Cydan: (i) the Confidentiality Agreement and (ii) an implied contract related to the Business Plan.

**1. The Confidentiality Agreement is Enforceable**

Defendants argue the Confidentiality Agreement is unenforceable because the Hempels never incorporated Solution Therapeutics. DM 4. Defendants are incorrect. The Hempels were Solution Therapeutics's promoters. Therefore, they have the right to enforce contracts they entered into on its behalf.

"Contracts are frequently made by promoters on behalf of corporations which they expect to organize," such that for purposes of enforcement, "the contract is treated as that of the promoter." 12 S. Williston, *Contracts* §35:71, pp. 534-35 (4th Ed. Lord 1999). As the Nevada Supreme Court has recognized, a corporate promoter is only "divested of his rights" to enforce a pre-incorporation contract when the corporation is substituted for the promoter by novation. *Jacobson v. Stern*, 96 Nev. 56, 61 (1980) (cited at DM 4). In other words, corporate promoters "retain the power to enforce pre-incorporation contracts—even if the proposed corporation never even comes into being." *T St. Dev., L.L.C. v. Dereje*, Civ. Action No. 05-524 (GK), 2005 U.S. Dist. LEXIS 38713, \*14-15 (D.D.C. Dec. 19, 2005) (emphasis added); see also *Hoppe v. Percheron Assocs. LLC*, No. 11-cv-03233-CBS, 2012 U.S. Dist. LEXIS 107149, at \*11 (D. Colo. Aug. 1, 2012) (citing cases); *Davis Wine Co. v. Vina Y Bodega Estampa, S.A.*, 823 F. Supp. 2d 1159, 1176 (D. Or. 2011) (citing cases); 18 Am. Jur. 2d *Corporations* §136 (2011) ("Generally, a promoter is entitled to the benefit of the contract he made on behalf of the corporation and is a proper party plaintiff to enforce those rights."); 1A William Meade Fletcher *et al.*, *Fletcher Cyclopedia of the Law of*



1 *Private Corporations* § 271 (Perm. Ed. 2010) (same); Restatement (Third) of Agency § 6.04 (3rd  
2 2006) (same).

3 The Hempels executed the Confidentiality Agreement on behalf of Solution Therapeutics,  
4 the corporation they intended to form. *See* Confidentiality Agreement. The Hempels conferred the  
5 benefits of that contract on Cydan by disclosing their confidential information. Thus, the Hempels  
6 can hold Defendants liable for its breach. Indeed, Defendants cannot accept the benefits of the  
7 Confidentiality Agreement while repudiating its terms. *Chartrand v. Barney's Club, Inc.*, 380 F.2d  
8 97, 102 (9th Cir. 1967).

## 9 **2. An Implied Contract Governed Use of the Business Plan**

10 The Hempels also had an implied contract with Cydan regarding their Business Plan. An  
11 implied-in-fact contract exists where “the parties intended to contract and promises were ex-  
12 changed, the general obligations for which [were] sufficiently clear.” *Commonwealth Land Title*  
13 *Ins. Co. v. Iota Indigo, LLC*, No. 2:13-cv-01837-MMD-PAL, 2014 U.S. Dist. LEXIS 5912, at \*3-  
14 4 (D. Nev. Jan. 14, 2014) (quotation marks omitted). Moreover, “an express agreement regarding  
15 the confidentiality of particular information may be evidence of the parties’ expectations regarding  
16 the confidentiality of other information not within the scope of the agreement.” Restatement  
17 (Third) of Unfair Competition § 41 cmt. b (3rd 1995). A business plan may be protected by an  
18 implied contract of confidentiality when the plan is novel and concrete. *Bergman v. Electrolux*  
19 *Corp.*, 558 F. Supp. 1351, 1353 (D. Nev. 1983). “Novelty pertains to originality or innovation;  
20 concreteness means that the idea has been sufficiently developed so as to be ready for immediate  
21 use without additional embellishment.” *Id.* Whether the plan is novel and concrete is a question of  
22 fact. *Id.*

23 Cydan and the Hempels entered into an implied contract to maintain the confidentiality of  
24 the Business Plan. On behalf of Cydan, Adams initiated contact with the Hempels to discuss col-  
25 laboration, and solicited a meeting. *Id.* ¶¶ 43-49; *see also* Hempel Decl. ¶¶ & Exs. 1-2. In advance  
26 of that meeting, Hugh sent the Business Plan, which he prominently marked “Confidential.” *Id.* ¶  
27 45; *see also* Business Plan. Thereafter, the parties executed a Confidentiality Agreement which  
28

1 expressly included “business plans.” Confidentiality Agreement § 1(a). Under the circumstances  
2 show Cydan implicitly agreed it would not use the Business Plan without the Hempels’ consent.

3 The Business Plan was novel and concrete. Compl. ¶¶ 45-47; *see also* Business Plan. It  
4 was novel. It set forth a path for the commercialization of cyclodextrin—a new treatment for NPC  
5 that had never been commercialized—and it was buttressed by the Hempels’ unique body of med-  
6 ical research regarding intrathecal cyclodextrin treatments. *See* Business Plan. In fact, Cydan re-  
7 sponded to the Business Plan by saying that the Hempels’ work was “truly amazing.” *Id.* ¶ 48.

8 And it was concrete. Oral presentations, demonstrations, and written proposals of ideas  
9 that are sufficiently developed to be “usable” satisfy the concreteness requirement. *Bergman*, 558  
10 F. Supp. 1351; *cf. On Demand Direct Response, LLC v. McCart-Pollak*, No. 2:15-cv-01576-  
11 MMD-NJK, 2017 U.S. Dist. LEXIS 123780, at \*8 (D. Nev. Aug. 4, 2017) (holding idea and bro-  
12 chure sufficient to create property interest for quasi-contract). Here, the Business Plan was a 43-  
13 page presentation detailing the business goals and the scientific and medical research data estab-  
14 lishing the viability of the enterprise, along with the relevant collaborators and ongoing research  
15 to illustrate the flexibility of the enterprise. Compl. ¶¶ 45-46; *see also* Business Plan. And Cydan  
16 executed that plan in Vtesse. Accordingly, Plaintiffs have alleged an implied contract.

17 **B. The Complaint Alleges Cydan and Vtesse Breached those Contracts**

18 The Complaint plausibly alleges that Defendants breached the Confidentiality Agreement  
19 and implied contract regarding the Business Plan.

20 A breach of confidentiality can be plausibly inferred from the circumstances of the disclo-  
21 sure and alleged breach. *See Gilead Scis., Inc. v. Abbott Labs., Inc.*, Civil Action No. 13-2034-  
22 GMS, 2015 U.S. Dist. LEXIS 31006, at \*23-28 (D. Del. Mar. 13, 2015) (finding plausible breach  
23 when plaintiff’s confidential disclosure of efficacy data in the context of potential acquisition oc-  
24 curred in close proximity to defendant’s filing of related patent applications).

25 The Hempels have plausibly alleged that Cydan breached the Confidentiality Agreement.  
26 Cydan promised not to use the Hempels’ Protected Material—including, but not limited to, their  
27 “current and planned drug and biologic delivery systems and agents, medical or diagnostic  
28

1 treatments,” and their business plans—for any purpose except for exploring a joint venture. Compl.  
2 ¶¶ 51-54; *see also* Confidentiality Agreement, Recitals & §§ 1 & 3. At the time, the Hempels’  
3 medical research related to intrathecal treatments of cyclodextrin was unique; it was the only re-  
4 source from which to analyze the commercial prospects of an enterprise dedicated to intrathecal  
5 treatments of cyclodextrin. *See* Compl. ¶¶ 37-40 & 85-88. Four months after signing the Confi-  
6 dentiality Agreement, reviewing the Hempels’ Protected Material, and eliciting assistance from  
7 the Hempels, Cydan told the Hempels that it intended to go forward with the joint venture. Compl.  
8 ¶¶ 65-66. And it did so, only by cutting the Hempels out without their consent. Cydan’s misuse is  
9 manifest.

10       The allegations in the Complaint also give rise to a plausible inference that Cydan used the  
11 Business Plan. First, Cydan *admitted* it was going forward with the Hempels’ proposal. *See* Compl.  
12 ¶¶ 65-66; *see also* Hempel Decl. Ex. 7. Second, Cydan formed Vtesse and its executives sat on  
13 Vtesse’s board of directors. Compl. ¶ 72. And, third, Vtesse is virtually identical to Solution Ther-  
14 apeutics, as described in the Business Plan. Both are corporations dedicated to developing intrathe-  
15 cal cyclodextrin treatments for NPC using the same dosing strategies. Both focused on obtaining  
16 a Priority Review Voucher as a primary source of value. And Vtesse placed on its science review  
17 board the same researchers identified in the Business Plan. *Id.* ¶¶ 70-74; *see also* Business Plan  
18 13. The timing of the disclosure and Cydan’s creation of an identical company dedicated to an  
19 identical treatment for an ultra-rare disease gives rise to a plausible inference of misuse.

20       For their part, Defendants rely upon inapposite case law, *i.e.*, cases involving plaintiffs  
21 pleading the contents of the wrong contract, *see US Bank, N.A. v. Recovery Servs. Northwest, Inc.*,  
22 Case No. 2:13-cv-01254-APG-GWF, 2014 U.S. Dist. LEXIS 47172, at \*5 (D. Nev. Apr. 4, 2014),  
23 or failing to identify relevant contractual clauses, *see Desio v. Russell Rd. Food & Bev., LLC*, No.  
24 2:15-cv-01440, 2016 U.S. Dist. LEXIS 123077, at \*9-10 (D. Nev. Sept. 9, 2016). By contrast, the  
25 Hempels have identified the clauses of the contract that were breached, Compl. ¶¶ 52-55, and have  
26 explained how Defendants breached those clauses, *id.* ¶¶ 69-91.

27       Defendants’ bald assertion that the Hempels’ confidential information was publicly  
28

1 available is equally flawed. Defendants' concede that the Hempel Twins' medical data was confi-  
 2 dential. DM 8. The confidential information included confidential submissions to the FDA. Compl.  
 3 ¶ 57. And there is no merit to Defendants' claim that the results of Hempels' collaborations with  
 4 Johnson & Johnson were non-confidential, DM 5, because collaboration in confidence does not  
 5 constitute disclosure, *see Bartech Sys. Int'l, Inc. v. Mobile Simple Sols., Inc.*, No. 2:15-cv-02422-  
 6 MMD-NJK, 2016 U.S. Dist. LEXIS 68030, at \*18 (D. Nev. May 24, 2016). Finally, even if all of  
 7 the information were publicly-available, "compilations of publicly-available information, if they  
 8 took time and effort to create, may be protected by confidentiality agreements." *Orthofix Inc. v.*  
 9 *Gordon*, No. 1:13-cv-01463-SLD-TSH, 2016 U.S. Dist. LEXIS 38852, at \*26 (C.D. Ill. Mar. 24,  
 10 2016). Ultimately, whether the confidential information was public is a fact issue.

11 In sum, the Complaint plausibly alleges that the Hempels invested years, and millions of  
 12 dollars, taking enormous personal risks to develop the confidential information, and that Cydan  
 13 made unauthorized use of the Hempels' confidential information and Business Plan.

#### 14 C. Vtesse is Bound by Cydan's Contracts with the Hempels

15 A corporation may, when organized, expressly or impliedly ratify contracts entered into by  
 16 its promoters prior to its existence. *Jacobson*, 96 Nev. at 60-61 (cited at DM 4); *see also Chartrand*,  
 17 380 F.2d at 100-02. Ratification occurs when the company accepts the benefits of the contract.  
 18 *Jacobson*, 96 Nev. at 60-61; *see also Chartrand*, 380 F.2d at 100-02. Vtesse was formed by Cydan  
 19 executives who had knowledge of the Hempels' confidential information and Business Plan, and  
 20 who sat on Vtesse's board of directors. Compl. ¶¶ 43-56 & 72. Vtesse thus accepted the benefits  
 21 of Cydan's contracts with the Hempels, *i.e.*, access to the Hempels' confidential information and  
 22 knowledge of the commercial viability of their proposal, and exploited that knowledge and infor-  
 23 mation when executing the Hempels' Business Plan. Thus, Vtesse ratified its contractual obliga-  
 24 tions to the Hempels and is liable for their breach.

## 25 II. THE HEMPELS HAVE STATED A CLAIM FOR MISAPPROPRIATION

26 Under Nevada law, the elements of a misappropriation of trade secrets claim are: (1) a  
 27 valuable trade secret; (2) misappropriation of the trade secret through use, disclosure, or  
 28

1 nondisclosure of use of the trade secret; and (3) the requirement that the misappropriation be  
 2 wrongful because it was made in breach of an express or implied contract or by a party with a duty  
 3 not to disclose. *Frantz v. Johnson*, 116 Nev. 455, 466 (2000) (applying Nevada's Uniform Trade  
 4 Secrets Act, Nev. Rev. Stat. §§ 600A.010-.100 ("NUTSA")). Each element is adequately alleged.

5 **A. The Hempels' Disclosed Trade Secrets to Cydan**

6 A "trade secret" is "information" that "[d]erives independent economic value . . . from not  
 7 being generally known" and "[i]s the subject of efforts that are reasonable under the circumstances  
 8 to maintain its secrecy." Nev. Rev. Stat. § 600A.030 (emphasis added). The Restatement likewise  
 9 defines a trade secret as "any information that can be used in the operation of a business or other  
 10 enterprise and that is sufficiently valuable and secret to afford an actual or potential economic  
 11 advantage over others." Restatement (Third) of Unfair Competition § 39. "[T]he requirement of  
 12 secrecy is satisfied if it would be difficult or costly for others who could exploit the information to  
 13 acquire it without resort" to wrongful conduct. *Id.* § 39, cmt f. Whether information constitutes a  
 14 trade secret is a question of fact. *Frantz*, 116 Nev. at 466.

15 Defendants insist the Hempels have not identified the trade secrets with specificity. DM 8.  
 16 There is no such requirement where, as here, the information at issue is a voluminous body of data  
 17 and research. *See Glob. Advanced Metals USA, Inc. v. Kemet Blue Powder Corp.*, No. 3:11-cv-  
 18 00793, 2012 U.S. Dist. LEXIS 126550, at \*17 (D. Nev. Sept. 6, 2012) (cited in DM 22). In any  
 19 event, the Hempels have carefully identified the trade secrets they disclosed:

20 *First*, the Hempels disclosed "all information related to their daughters' treatment with  
 21 cyclodextrin," including their intrathecal dosages and results of their intrathecal injections. *See*  
 22 Compl. ¶¶ 57 & 62. Defendants concede that information was secret. DM 13. The Hempels also  
 23 disclosed their confidential FDA submissions. Compl. ¶¶ 57. The medical data and FDA submis-  
 24 sions established the viability of the Hempels' intrathecal cyclodextrin treatment for NPC that was  
 25 the foundation for Vtesse's business model.

26 *Second*, a business plan can constitute a trade secret. *See Fuhu, Inc. v. Toys "R" Us, Inc.*,  
 27 No. 12cv2308-WQH-WVG, 2013 U.S. Dist. LEXIS 196563, at \*26-27 (S.D. Cal. Mar. 1, 2013);

1 *Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg.*, 649 F. Supp. 2d 702, 718-19 (N.D.  
 2 Ohio 2009). Here, the Business Plan was novel, concrete, and supported by secret and commer-  
 3 cially valuable compilations of data establishing its viability. *See* Compl. ¶¶ 45-47 & 60.

4 *Third*, the Hempels provided Cydan with industry contacts and a library of research. *Id.* ¶¶  
 5 59, 63. Though some of this information could be described colloquially “public,” that is not dis-  
 6 positive of its trade secret quality. “Even if all of the information is publicly available, a unique  
 7 compilation of that information, which adds value to the information, also may qualify as a trade  
 8 secret.” *Capital Asset Research Corp. v. Finnegan*, 160 F.3d 683, 686 (11th Cir. 1998); *see also*  
 9 Restatement (Third) of Unfair Competition § 39, cmt f. The Hempels’ compilation of data and  
 10 goodwill gave Cydan a competitive advantage because it lent legitimacy to Cydan’s efforts and  
 11 saved Cydan years it would have needed to turn Vtesse into a viable investment vehicle.

12 The Hempels’ trade secrets obviously gave Defendants an economic advantage, but De-  
 13 fendants dispute whether the Hempels made reasonable efforts to maintain their secrecy. DM 7-8.  
 14 Defendants thereby improperly dispute the truth of factual allegations alleging that the Hempels’  
 15 kept their trade secrets in confidence. *See, e.g.*, Compl. ¶¶ 8, 10, 42, 45, 57, 62, & 77.

16 Defendants’ arguments are factually baseless, and legally non-dispositive. “Trade secret  
 17 rights can survive even relatively broad dissemination if the disclosures are made in confidence.”  
 18 Restatement (Third) of Unfair Competition § 39. Disclosures subject to express or implied confi-  
 19 dentiality agreements do not affect trade secret status. *See, e.g., V’Guara Inc. v. Dec*, 925 F. Supp.  
 20 2d 1120, 1125 (D. Nev. 2013) (disclosure to “someone who needed it” on terms of confidentiality  
 21 created presumption of secrecy). And marking documents as “Confidential” is sufficient to create  
 22 a presumption of secrecy. *Id.* at 1124); *see also* Nev. Rev. Stat. § 600A.032.

23 The Hempels made reasonable efforts to maintain secrecy. They kept the information in a  
 24 password-protected database. Compl. ¶ 57. They disclosed their trade secrets to Defendants pur-  
 25 suant to a Confidentiality Agreement. *Id.* ¶¶ 50-54. And the Business Plan was prominently marked  
 26 “Confidential” on its front cover. *See* Business Plan.

27 Though the Hempels’ made limited disclosures to specific researchers, Compl. ¶¶ 37, 77,  
 28



1 78, & 82-83, they were always *for medical purposes*, i.e., to ease the suffering of children afflicted  
2 by NPC, and always with the mutual understanding that their trade secrets would not be dissemi-  
3 nated or otherwise used *for commercial purposes*. Compl. ¶¶ 75-91. Disclosures under those cir-  
4 cumstances evidence reasonable efforts to maintain secrecy, and do not affect trade secret protec-  
5 tion. Indeed, when Defendants point to the RORs as evidence of public disclosure, they completely  
6 miss the mark. DM 8-9. An ROR shows that the subject information is both valuable and secret.  
7 *See A. L. Labs. Inc. v. Philips Roxane, Inc.*, 803 F.2d 378, 381 (8th Cir. 1986).

8 Finally, Defendants make the irrelevant observation that some of the Hempels' cyclodex-  
9 trin protocols were public. DM 7. Disclosure of formulas does not affect the trade secret quality of  
10 the underlying data. *See, e.g., Allied Erecting*, 649 F. Supp. 2d at 718-19 (finding public availabil-  
11 ity of formula irrelevant where "the trade secret consists of the actual data that allows an engineer  
12 to make those calculations"). The trade secrets were not the protocols, but rather the confidential  
13 data collected in connection with those protocols that demonstrated their efficacy.

14 **B. Cydan Had a Duty of Non-Use and Non-Disclosure**

15 NUTSA prohibits disclosure of another's trade secret when the trade secret was "[a]cquired  
16 under circumstances giving rise to a duty to maintain its secrecy or limit its use." Nev. Rev. Stat.  
17 § 600A.030(2); *see also Bartech*, 2016 U.S. Dist. LEXIS 68030, at \*20. "During negotiations with  
18 prospective buyers, customers, or licensees, for example, it is sometimes necessary to disclose  
19 trade secrets in order to permit the other party to evaluate the merits of the proposed transaction.  
20 The law of trade secrets provides the necessary assurance that the limited purpose of such disclo-  
21 sures will be respected." Restatement (Third) of Unfair Competition § 41; *see also Phillips v. Frey*,  
22 20 F.3d 623, 631-32 (5th Cir. 1994) (holding that disclosures in the context of business negotia-  
23 tions are implicitly confidential).

24 Defendants acquired the Hempels' trade secrets under circumstances that created a duty of  
25 secrecy. They initiated contact with the Hempels, sought a private meeting, received a Business  
26 Plan conspicuously marked "Confidential," and executed a Confidentiality Agreement with the  
27 Hempels to their password-protected trade secrets.

Defendants assert that the Hempels' were unreasonable to disclose their Business Plan to Cydan, "a company they presumably knew was interested in developing a treatment for NPC." DM 7. That argument is stunningly cynical. "The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law. The necessity of good faith and honest, fair dealing, is the very life and spirit of the commercial world." *Kewanee v. Bicron*, 416 U.S. 470, 481-82 (1974). Defendants effectively concede they opportunistically took advantage of the Hempels, a family that took enormous personal risks to develop a treatment for their terminally-ill children, as well as other NPC children around the world. Defendants' opportunism is precisely the kind of behavior trade secret laws are designed to punish.

#### C. Cydan Used and Disclosed the Hempels' Trade Secrets

The Complaint alleges Defendants used and disclosed the Hempels' trade secrets. A plaintiff is not required to plead precisely how the trade secrets were misappropriated. *See Space Data Corp. v. X*, No. 16-cv-03260, 2017 U.S. Dist. LEXIS 22571, at \*5 (N.D. Cal. Feb. 16, 2017) (cited at DM 8). "[W]hen a defendant has access to a plaintiff's trade secrets in the course of a confidential relationship, the defendant's subsequent manufacture of a closely similar [product] shifts the burden to the defendant to show it independently developed its product." *SleekEZ, LLC v. Horton*, No. CV 16-09-BLG-SPW-TJC, 2018 U.S. Dist. LEXIS 33858, at \*18 (D. Mont. Jan. 8, 2018).

The Hempels have satisfied their burden. After gaining access to the Hempels' trade secrets under obligations of confidentiality, Cydan told the Hempels it intended to go forward with their joint venture. Compl. ¶¶ 65-66. Two months later, Cydan launched a company that mimicked the Hempels' Business Plan and that only would have been possible by reference to the Hempels' trade secrets. *Id.* ¶ 70. Then Cydan improperly (a) disclosed those trade secrets to Vtesse—an entity that directly competed with the Hempels' commercial interests—by, among other things, placing its executives in control of Vtesse, and (b) used those trade secrets to develop an asset that mirrored the Hempels' proposal. *Id.* ¶¶ 71-74.

#### D. Vtesse and Sucampo are Liable for Misappropriation

Defendants argue that Vtesse and Sucampo are not liable for misappropriation. DM 8-9.



Defendants ignore the relevant case law.

**1. Vtesse and Sucampo Knew or Should Have Known  
They Were Benefitting from Cydan's Misappropriation**

A party may be liable for misappropriation where it knew or had reason to know it was receiving or benefitting from misappropriated trade secret information. *See New Eng. Life Ins. Co. v. Lee*, No. 2:14-CV-1797 JCM (NJK), 2015 U.S. Dist. LEXIS 39462, at \*20 (D. Nev. Mar. 27, 2015); *see also PMC, Inc. v. Kadisha*, 93 Cal. Rptr. 2d 663, 669-79 (Cal. Ct. App. 2000) (holding investors of a corporation liable for misappropriation even though trade secret misappropriation began before their investment); 2-7 Milgrim on Trade Secrets § 7.02[2][c] (“There is apt to be imputation of knowledge to the second user where it is a corporation organized by persons subject to a duty of secrecy to the first user.” (citing cases)). Here, prior to Vtesse’s formation, the Hempels were the only people in the world who had collected a comprehensive data set regarding intrathecal treatments of cyclodextrin, which was the foundation of Vtesse’s enterprise. It is implausible that Vtesse would dedicate its venture to intrathecal cyclodextrin treatments, that its investors would invest millions in that venture, and that Sucampo would purchase that enterprise for \$200 million, without realizing that they were benefitting from the unauthorized use of the Hempels’ trade secrets. Accordingly, Vtesse and Sucampo are liable for the misappropriation Cydan initiated because they ratified and benefited from it.

Moreover, a promoter’s knowledge is imputed to a corporation if the promoter becomes a director. *See Bates v. Cottonwood Cove Corp.*, 84 Nev. 388, 391-92 (1968); *cf. USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F. Supp. 2d 1210, 1217-18 (D. Nev. 2011). And “[i]t is well-established that, if a later formed legal entity accepts benefits from earlier offenses, it may be liable for those offenses.” *Seibold v. Camulos Partners LP*, No. Civ.A.5176, 2012 Del. Ch. LEXIS 216, at \*87 n.210 (Del. Ch. Sept. 17, 2012); 1A Fletcher, *Cyclopedia* § 218 (same). Here, Vtesse knowingly accepted the benefits of Cydan’s misconduct because Cydan executives with knowledge of the misappropriation—Adams and Csimma—sat on Vtesse’s board. Compl. ¶ 72. As such, Vtesse accepted liability for their misconduct.

1                   **2.       Vtesse Is Liable for Its Own Acts of Misappropriation**

2           Vtesse is also liable for independent acts of misappropriation. Intentionally soliciting dis-  
3 closure of trade secrets from third-parties under obligations of non-disclosure is misappropriation.  
4 *See, e.g., Colgate-Palmolive Co. v. Carter Prods., Inc.*, 230 F.2d 855, 865 (4th Cir. 1956).

5           Vtesse sponsored NIH researchers who, as Vtesse knew, had gained access to the  
6 Hempels' trade secrets *for medical research purposes* on conditions of confidentiality and non-  
7 competition, and then encouraged those researchers to misappropriate the Hempels' trade secrets  
8 for its own commercial gain. Compl. ¶¶ 75-91. Vtesse knew or should have known that those  
9 researchers had a duty not to use or disclose the Hempels' trade secrets for a competing purpose.  
10 Moreover, those researchers' knowledge of their duties of confidentiality is imputed to Vtesse by  
11 virtue of their placement on Vtesse's scientific board of review. *See* Compl. ¶¶ 81 & 91.

12           **III.    THE HEMPELS' COMMON LAW CLAIMS ARE NOT**  
13           **PREEMPTED AND ARE ADEQUATELY PLEADED**

14           **A.     The Hempels' Claims Are Not Preempted by NUTSA**

15           Contrary to Defendants' assertions, NUTSA does not preempt all claims that arise from a  
16 factual circumstance possibly involving a trade secret. *SVI, Inc. v. Supreme Corp.*, No. 2:16-cv-  
17 01098-JAD-NJK, 2017 U.S. Dist. LEXIS 81983, at \*18-26 (D. Nev. May 30, 2017). NUTSA does  
18 not affect contract claims, and only displaces "conflicting" tort and restitutionary laws of Nevada.  
19 Nev. Rev. Stat. 600A.090(1) ; *see also Frantz*, 116 Nev. at 465 n.3 (NUTSA does not preempt  
20 claims "that do not depend on the information at issue being deemed a trade secret").<sup>3</sup>

21           Defendants' misconduct goes beyond misappropriation of trade secrets. Defendants  
22 wrongfully used and disclosed the Hempels' Business Plan and Protected Material, which were  
23 subject to express and implied contracts. The Hempels' tort and restitutionary claims premised on  
24 those breaches are not preempted. *See Custom Teleconnect, Inc. v. Int'l Tele-Servs., Inc.*, 254 F.

25 \_\_\_\_\_  
26 <sup>3</sup> In contrast to Nevada's narrow approach to preemption, some jurisdictions have taken a broader  
27 view. *See K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 90 Cal. Rptr. 3d 247,  
28 259 (Cal. Ct. App. 2009) (contrasting California's blanket preemption with the narrow approach).  
Thus, the cases cited by Defendants that apply blanket preemption are inapposite. *See* DM 9-11.

1 Supp. 2d 1173, 1183 (D. Nev. 2003) (quoted in DM 10). Moreover, Defendants breached various  
 2 duties related to their joint venture with the Hempels, including duties of loyalty and good faith,  
 3 by diverting the intrathecal cyclodextrin opportunity to Vtesse and denying the Hempels any part  
 4 of the venture. Defendants themselves cite cases holding that NUTSA does not preempt such  
 5 claims. *See, e.g., SVI*, 2017 U.S. Dist. LEXIS 81983, at \*18-26 (cited in DM 11 n.6).

6 Dismissal on preemption grounds would also be premature because the Hempels are per-  
 7 mitted to plead in the alternative. Rule 8 permits a plaintiff to plead common law claims, even if  
 8 they might otherwise be preempted by the UTSA. *See Montgomery v. Etreppid Techs., LLC*, Nos.  
 9 3:06-CV-00056-PMP-VPC, 3:06-CV-00145-PMP-VPC, 2008 U.S. Dist. LEXIS 28118, at \*9 (D.  
 10 Nev. Apr. 7, 2008).

## 11 **B. The Hempels Have Stated Common Law Claims**

### 12 **1. The Hempels Have Stated a Claim for Breach of Fiduciary Duty**

13 This Court has recognized the fiduciary or confidential relationship between joint ventur-  
 14 ers. *Nichols v. Findlay Auto. Grp., Inc.*, No. 2:12-cv-00093-MMD-VCF, 2013 U.S. Dist. LEXIS  
 15 25960, at \*9 (D. Nev. Feb. 26, 2013). A joint venture is an “informal partnership wherein two or  
 16 more persons conduct some business enterprise, agreeing to share jointly, or in proportion to cap-  
 17 ital contributed, in profits and losses.” *Id.* (quotation omitted). The fiduciary relationship between  
 18 joint venturers “may be predicated upon an arrangement to assume [a joint venture] relationship.”  
 19 *Riddle v. Simmons*, 922 So. 2d 1267, 1282 (La. App. Ct. 2006). Whether parties are in a joint  
 20 venture “depends upon the intention of the parties and every case must stand upon its own merits.”  
 21 *Las Vegas Machine & Eng’g Works, Inc. v. Roemisch*, 67 Nev. 1, 9 (1950). It is axiomatic that  
 22 venturers “owe one another the duties of loyalty, good faith, honesty, and full disclosure.” *Nichols*,  
 23 2013 U.S. Dist. LEXIS 25960, at \*9. “[A] coventurer may not acquire and retain for him- or herself  
 24 any private or secret advantage in connection with the common enterprise.” 46 Am. Jur. 2d *Joint*  
 25 *Ventures* § 34.

26 This Court’s opinion in *Nichols*, holding that the plaintiff adequately alleged a joint ven-  
 27 ture, is directly on point. In *Nichols*, the plaintiff alleged the parties met, “discuss[ed] working  
 28

1 together to develop and promote an opportunity,” and the defendant “followed-up the meeting with  
2 an email” noting that the defendant “was ‘looking forward to developing this opportunity to-  
3 gether.’” *Nichols*, 2013 U.S. Dist. LEXIS 25960, at \*10-11. The plaintiff also alleged the parties  
4 subsequently collaborated to develop a website and the “details of the advertising campaign to be  
5 used with the concept.” *Id.* at \*11. Thereafter, the defendant created a directly competing product  
6 in violation of the parties’ relationship. *Id.* at \*11.

7       The same thing happened here: Cydan solicited a confidential relationship with the  
8 Hempels, and met with them to discuss a joint venture for NPC. Following that meeting, Cydan  
9 requested access to the Hempels’ Protected Material and asked the Hempels to make introductions  
10 to advance their joint venture. After gaining access, and assistance from the Hempels, Cydan  
11 touted its enthusiasm about the venture over the course of five months, ultimately confirming that  
12 they were “moving forward” with their joint venture. Compl. ¶¶ 65. Cydan then betrayed the col-  
13 laboration by forming Vtesse, in secret, denying the Hempels’ any benefit from the jointly-devel-  
14 oped enterprise. *Id.* ¶¶ 69-74.

15       Defendants’ motion is premised on the incoherent argument that their relationship with the  
16 Hempels was non-confidential *because* they entered into a Confidentiality Agreement. *See* DM  
17 12. That makes no sense. The Confidentiality Agreement *created* a confidential relationship. Con-  
18 fidentiality Agreement, Recitals, §§ 1 & 3. That confidential relationship developed into a joint  
19 venture. And Cydan violated the trust created by that relationship, diverting the opportunity to  
20 Vtesse, to the exclusion of the Hempels.

## 21               2.       The Hempels Have Stated a Claim for Unjust Enrichment

22       Unjust enrichment reflects “fundamental principles of justice or equity and good con-  
23 science.” *Topaz Mut. Co. v. Marsh*, 108 Nev. 845, 856 (1992). The elements are “a benefit con-  
24 ferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and ac-  
25 ceptance and retention by the defendant of such benefit under circumstances such that it would be  
26 inequitable for him to retain the benefit without payment of the value thereof.” *LeasePartners*  
27 *Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 755 (1997).

Defendants insist Nevada law requires a “direct relationship” to establish unjust enrichment. DM 13. That is not so. “Even an indirect benefit will support an unjust enrichment claim.” *Momot v. Mastro*, No. 2:09-cv-00975-RLH-LRL, 2011 U.S. Dist. LEXIS 51747, at \*6 (D. Nev. May 12, 2011); *Topaz*, 108 Nev. at 856 (recognizing unjust enrichment claim where plaintiff conferred indirect benefit). Moreover, unjust enrichment is flexible remedy, and Nevada law merely requires “some direct relationship or dealings” between the benefit-conferring plaintiff and the benefit-appreciating defendant. *On Demand*, 2017 U.S. Dist. LEXIS 123780, at \*8.

The facts here are similar to *Philips International Investments, LLC v. Pektor*, 117 A.D.3d 1 (N.Y. 1st Dep’t. 2014). In *Philips*, a plaintiff entered into a joint venture with two individuals to purchase commercial property. The purchase was not consummated. Plaintiff later discovered that the two individuals had formed different partnerships to purchase the property, effectively cutting the original joint venture out of the transaction. The plaintiff sued the partnerships for unjust enrichment. The court held there was a sufficient relationship between the plaintiff and the partnerships because the joint venturers:

[C]reated the partnership defendants as vehicles to appropriate the venture’s business opportunity of buying the viable properties. All of the [joint venturers’] knowledge and scheming is, under this theory, imputable to the partnership defendants . . . . [H]ere, the partnerships, through the [joint venturers], knew of the alleged wrong being done to plaintiff and of their essential role in the allegedly wrongful scheme.

*Id.* at 103.<sup>4</sup>

Here, Cydan jointly ventured with the Hempels, received and used the Hempels’ Protected Material, then diverted the business opportunity from the Hempels to Vtesse and its investors (which included Cydan). And Vtesse knew that it was receiving an improper benefit because, among other things, Cydan executives sat on its board and everyone in the NPC community knew that the Hempels’ Protected Material was unique. By imputation and in fact, Vtesse knew it had been unjustly enriched. And it is plausible, if not inescapable, that Sucampo learned it was

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<sup>4</sup> Plaintiffs are not aware of any conflict between New York and Nevada law on this point.

1 receiving an improperly benefit from the Hempels during the course of due diligence.

2 **3. The Hempels Have Stated a Claim for Tortious Interference**

3 To state a claim for tortious interference a plaintiff must allege (1) a valid and existing  
4 contract; (2) defendant's knowledge of the contract; (3) intentional acts intended or designed to  
5 disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage.  
6 *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274 (2003). Each of the elements is alleged.

7 Defendants' motion is flawed in three respects. *See* DM 14. *First*, Cydan and the Hempels'  
8 entered into express and implied contracts. *See supra* I.A. *Second*, Vtesse had imputed and actual  
9 knowledge of the Hempels' contract by virtue of Adams and Csimma on its board of directors. *See*  
10 *supra* I.C. And *third*, Vtesse knowingly disrupted Cydan's contractual relationship with the  
11 Hempels by procuring access to and using the Protected Material. *See supra* II.D.

12 **4. The Hempels Have Stated a Claim for Conversion**

13 Defendants' arguments against the conversion claim have no merit. DM 14-15. *First*, the  
14 Hempels have alleged a property interest that is "capable of precise definition" over which they  
15 had a "legitimate claim to exclusivity." *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*,  
16 124 Nev. 901, 911 (2008). Indeed, the Protected Material was safeguarded by passwords and main-  
17 tained in confidence. Compl. ¶ 57.

18 *Second*, Defendants claim "[n]othing prevented Plaintiffs from pursuing a commercial  
19 treatment for NPC on their own," and as such, there was no "serious interference" with the  
20 Hempels' property rights. DM 15. That argument is specious. Defendants' possession and use of  
21 the Hempels' Protected Material seriously interfered with the Hempels' efforts to commercialize  
22 their NPC treatment. Today, the Protected Material retains little independent commercial value.

23 And *finally*, Defendants insist that the Hempels have not alleged "actual losses." DM 15.  
24 But Nevada has not adopted such a narrow view of damages for conversion. Indeed, *Bader v.*  
25 *Cerri*, 96 Nev. 352 (1980), upon which Defendants rely, rejected the idea that "the full value of  
26 the property converted" was the "sole measure of damages," in favor of allowing the plaintiff  
27 prospective profits, *id.* at 356-58. Moreover, damages can include the value of the converted rights.

1 *M.C. Multi-Family Dev.*, 124 Nev. at 912. The Hempels suffered losses because Defendants' con-  
 2 version and use depreciated the commercial value of the Hempels' Protected Material.

### 3 **5. The Hempels Have Stated a Claim for Civil Conspiracy**

4 To establish a claim for civil conspiracy, a plaintiff must establish: (1) the commission of  
 5 an underlying tort; and (2) an agreement between the defendants to commit that tort. *GES, Inc. v.*  
 6 *Corbitt*, 117 Nev. 265, 270-71 (2001). The agreement can be "explicit or tacit." *Id.*

7 An agreement to misappropriate the Hempels' trade secrets is implicit in Defendants' co-  
 8 ordinated misuse of the Hempels' data. Moreover, Defendants have the requisite intent. "If the  
 9 actor knows that the consequences are certain, or substantially certain, to result from his act, and  
 10 still goes ahead, he is treated by the law as if he had in fact desired to produce the result." Restate-  
 11 ment (Second) of Torts § 8A (2nd 1979). Defendants' specific intent is manifest because tortious  
 12 harm to the Hempels was the foreseeable outcome of their misconduct. Defendants' assertion that  
 13 they lacked specific intent because each of them was "misappropriating the Hempels' information  
 14 for its own gain, not to cause a loss to the Hempels," DM 16, misconstrues the law.

### 15 **IV. SUCAMPO AND CYDAN II ARE ALSO LIABLE ON** 16 **GROUNDS OF VICARIOUS OR SUCCESSOR LIABILITY**

17 Defendants' incorrectly insist Sucampo and Cydan II are not liable for Vtesse and Cydan's  
 18 misconduct, respectively. DM 20-21. Presuming a modicum of diligence, Sucampo is liable for  
 19 misappropriation because it knew or should have known that it was acquiring an asset built upon  
 20 the Hempels' trade secrets and confidential information. *See supra* II.D Moreover, as set forth in  
 21 Plaintiffs' Opposition to Defendants' Consolidated Motion to Dismiss for Lack of Personal Juris-  
 22 diction ("Pls.' Opp'n PJ"), Sucampo subsumed Vtesse's operations and assets into its own ongo-  
 23 ing, giving rise to successor liability. Pls.' Opp'n PJ, Argument I.B. Similarly, Cydan II should be  
 24 held liable for Cydan's misconduct. Cydan II was formed one month after Cydan sold Vtesse to  
 25 Sucampo, was capitalized by the same investors, supplanted Cydan's operations, used the same  
 26 offices and personnel, and continued Cydan's mission. *See id.*



1 **V. THE COURT HAS SUBJECT MATTER JURISDICTION**

2 Defendants insist Solution Therapeutics's unincorporated status defeats diversity jurisdic-  
 3 tion. DM 20. But the citizenship of an unincorporated entity depends upon the citizenship of its  
 4 members. *See Fifty Assocs. v. Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1190 (9th Cir. 1970)  
 5 (cited in DM 20). The Hempels, sole owners of Solution Therapeutics, are domiciled in Nevada.  
 6 Compl. ¶ 13. Thus, Solution Therapeutics is a Nevada citizen, and the parties are diverse

7 The Court also has federal question jurisdiction. Count Seven alleges a violation of the  
 8 Defend Trade Secrets Act of 2016, 18 U.S.C. § 1832, *et seq.* ("DTSA"). The elements of a DTSA  
 9 claim are the same as a NUTSA claim, except DTSA only covers acts occurring on or after May  
 10 11, 2016. *Cave Consulting Grp., Inc. v. Truven Health Analytics Inc.*, No. 15-cv-02177-SI, 2017  
 11 U.S. Dist. LEXIS 62109, at \*8 (N.D. Cal. Apr. 24, 2017). DTSA applies to unauthorized uses after  
 12 its effective date. *Id.* at \*9. The DTSA claim survives because Defendants used the Hempels' trade  
 13 secrets in research and development that continued through October 2017. Compl. ¶¶ 79 & 91. At  
 14 minimum, the DTSA applies to Sucampo, which became a misappropriator by its investment in  
 15 Vtesse—with knowledge of Vtesse's misappropriation—on April 3, 2017. *Id.* ¶ 93.

16 **CONCLUSION**

17 For the foregoing reasons, Defendants' motion should be denied. To the extent the Court  
 18 grants any portion of Defendants' motion, the Hempels request leave to amend the complaint to  
 19 conform it to their opposition papers and cure any deficiencies identified by the Court.

20 DATED: April 23, 2018

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**CERTIFICATE OF SERVICE**

I, Valerie Weis, do hereby certify that I am an employee of The O'Mara Law Firm, P.C., and further certify that the foregoing document was electronically filed and served upon all parties via the Court's Electronic Filing system.

DATED: April 23, 2018

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